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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 402

JOSEPH F. LUCKE,

Petitioner,

vs.

RUSSELL S. DAVIS, Commissioner of Personnel of the State of Maryland

and

THE MUNICIPAL COURT OF BALTIMORE CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the within case on April 7, 1967, rehearing denied May 1, 1967, Mandate issued (judgment final) May 8, 1967, dismissing the appeal from a judgment of the Baltimore City Court, in which that latter tribunal, in turn, had affirmed the action of the state Commissioner of Personnel in dismissing the Petitioner from his job as a state employee in the Traffic Court Clerk's office, for exercising his right of Free Speech by mailing critical and satirical communications to the chief administrative officer under whom he was employed, and for publishing a political cartoon.

CITATIONS TO OPINIONS BELOW

The Per Curiam Opinion of the Court of Appeals of Maryland dismissing the appeal is reported at 245 Md. 706, 228 A2d 313. This Opinion is appended hereto as Appendix A. The Opinion of the Baltimore City Court affirming the Commissioner of Personnel, appears in the record as printed for the use of the Court below, at pp. E. 1-E. 19 (of "Appellant's Appendix") and the "Order" and "Supplemental Order" of the Commissioner (which are construed as his "opinions" under Rule 23(i) of this Court) appear at pp. E. 26-E. 38 of the same record, printed for the use of the Court below.

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

Date of Judgment and Entry of Same

The judgment of the Court below is appended hereto in "Appendix B." It is dated April 7, 1967 and was filed (entered) the same day.

Motion for Rehearing Denied, and Mandate

On May 1, 1967 the Petitioner's Motion for Reargument (before the Court of Appeals of Maryland) was denied. The notation appears in "Appendix B" hereof, page App. 7, as does the Court's Mandate (judgment final), dated May 8, 1967.

Jurisdiction

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257 (3), there having been drawn in question below, and the Petitioner claiming here, denial of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution, and there having been drawn in question a

state statute, as applied (in a manner allowing suppression of Free Speech), on the ground of its being administered in a manner making it repugnant to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. In light of the result reached by this Court in *Thorpe* v. *Housing Authority of the City of Durham* (April 7, 1967) 35 LW 4366, 385 U.S. ——, 87A S. Ct. ——, setting forth restrictions on permissible action by government even when acting in what is ordinarily a private capacity, was it constitutionally valid for the State of Maryland to discharge the Petitioner from his clerical job because he had exercised his right of Free Speech, by sending to the chief administrative officer of his department, letters critical, but not scurrilous, and not disloyal, concerning operation of the department in which he worked; which letters were, in fact, directed toward the improvement of the public service and public reputation of the department?

The state, in its administration of the state civil service law, assumed throughout all of the proceedings that it need not apply First Amendment Free Speech principles to its adjudication of personnel matters; was this an error under the First and Fourteenth Amendments?

2. Did the Court of Appeals of Maryland deny the Petitioner Due Process of Law by disposing of his case below by the application of that species of "novelty in procedural requirements" which this Court has held repeatedly, and as late as *Wright* v *State of Alabama* 83 S. Ct. 1244, 373 U.S. 289 "cannot be permitted to thwart review"; the novel procedural requirement in this instance being the allowance of a collateral attack on the

validity of a docket entry, in complete opposition to prior law on the subject?

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE RULES INVOLVED

The case involves the following:

1. A portion of the Fourteenth Amendment to the Constitution of the United States, making the First Amendment applicable to the States:

> ". . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. A portion of the First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech. . .

3. A portion of Article 64-A, "Merit System," sec. 33 of the Laws of Maryland (Michie, 1957):

> "An employee may be permanently separated from the classified service through . . . removal. . . .
>
> "No employee who has completed his probation may be permanently removed . . . except for cause. . . .
>
> "The Commissioner shall, by rule, prescribe what may constitute cause for removal, but no removal shall be allowed because of religious or political opinions or affiliations of any employee."

Sec. 44:

"This article [has as] . . . its purpose . . . to provide adequate means for the prompt removal from positions . . . of all persons . . . who may be indolent, incompetent, inefficient, or otherwise unfit. . . ." (This and the foregoing "religious or political opinions" limitations are the only removal limitations present in the statute.)

4. Rules 46 and 47 of the Commissioner of Personnel. (At p. E. 16 Appellant's Appendix, the lower court refers to Rule 47.):

Rule 46—

"[An employee may be suspended without pay] on account of misconduct, negligence, inefficiency, insubordination, disloyalty, or other reason satisfactory to the Commissioner."

Rule 47 sets forth fourteen specific causes for removal as well as a provision that "removal may be for causes other than those enumerated."

Rules 45, 46 and 47 are set forth in their entirety in Appendix C.

5. Maryland Rules of Procedure (Vol. 9B Annotated Code of Maryland (Michie, 1957)):

Rule 564:

"b. Judgment Nisi

"1. As Directed by the Court. "Where an action at law is tried upon the facts by the Court, the Court shall direct judgment *nisi* to be entered upon the law and the evidence.

"e. If a motion for new trial be not made, within the time prescribed by section a of this Rule, the Clerk shall enter a final judgment (judgment "absolute") as of course."

STATEMENT OF THE CASE

First Amendment

The Municipal Court of Baltimore City is the lowest level court in that city, serving, in essence, the functions of a magistrate's court, including lower-level criminal and traffic jurisdiction.

The chief administrative officer of the system, having sway over the office staff, the Clerk's staff, the stengraphers, and employees, is also the chief magisterial officer, and is called Chief Judge.

On July 17, the Appellant was suspended from his duties as a clerical worker in this court. The Commissioner of Personnel found that "a number of anonymous communications were placed in the record" (E. 30). The Commissioner further stated that he was "convinced the Respondent wrote these letters" (E. 30). This the Petitioner (the "Respondent" referred to) strenuously, and at very great personal expense denied having done. (The "Petition" in the Record below refers to an expenditure of $787 *just* to have the testimony transcribed and there were many hearings, days of testimony and three appeals). But findings of *fact,* of an administrative agency, are, to all and every intent and practical purpose, irrefutable, and this finding of *authorship* was not disputed in the Court below, and will not be disputed here. That is, it is not admitted, but it is not, for the purposes of this Petition, disputed.

The Commissioner also found, that "all" of the communications in question "were of an offensive nature"

(E. 30 "Appellant's Appendix"), and that, as a matter of law, these communications "reflected[ed] upon the loyalty of the [Petitioner] and they show . . . complete disrespect. . .".

It is disputed that this ruling of law was correct, and it is disputed that as a matter of law, the Appellant could be fired by a *government* agency for the sending of such communications, regardless of what a private employer could do, simply because the Constitution *prohibits* a state from abridging Free Speech by either the passage, or *administrative interpretation* of any law.

The ruling was upheld in the first appeal step (to the Baltimore City Court) and would have been affirmed again by the Court of Appeals of Maryland, that court said, if it had reached the question.

The communications involved were none of them obscene, vulgar, unrelated to Court business, dirty, unless use of the word "hell" is dirty, nor, it is submitted, either "scurrilous" or even "disloyal"—if that were, as a matter of law, a valid ground for dismissal. (See Argument, below).

Those on which the Baltimore City Court based its affirmance, were these:

1. (E. 5) (MUN CT #1) A notification to the Chief Judge in his capacity as administrative chief that the Chief Clerk played favorites.

2. (E. 5) (MUN CT #2) An envelope expressing the opinion that the Chief Judge, in his capacity as administrative chief, was taking a back seat to his Chief Clerk in administrative matters.

3. (E. 5) (MUN CT #4) A complaint concerning use of the Court teletype machine for transaction of private business.

4. (E. 6) (MUN CT #5) The claimed absence, because of lack of sobriety, of a public clerk-employee is reported.

5. (E. 6) (MUN CT #8) A report on public indignation, registered by incoming phone calls, and on confusion in the office, caused by the administrative decision to serve thousands of warrants, by mail, at one time.

6. (E. 6) (MUN CT #9) The suggestion that incompetence of the Chief Clerk may cause difficulties and entanglements to the Chief Judge.

7. (E. 6) (MUN CT #11) A "tip" that the Court's teletype machines were being further used for private business, and also that the reports thereby obtained are in some instances being sold.

8. (E. 7) A card suggesting that the Court is acquiring a bad reputation through the comportment of some of its members and members of the office staff, and more particularly, that high employee turnover is due to the Chief Clerk's methods, including the method of seeming to make the administrative chief his junior.

9. A political cartoon attributed to the Petitioner.

The Maryland Court stated

"We . . . have carefully reviewed the merits of the appellant's contentions, and were it necessary, we would rule that his dismissal was legally justified." (Last sentence of Opinion.)

Hoist by the Clerk's Petard

But this statement was merely in the nature of insurance, for the Court, actually, refused to reach the substantive question, having hoisted Petitioner out of court on the Baltimore City Court Clerk's petard, in the following manner:

At the close of the case in the Baltimore City Court, the Court Clerk made the following entry in the court docket:

> "3/29/66, Judgment *nisi* in favor of appellees (defendants). (Opinion of Court, 228 Atl. 2d at 314. App. A hereof, p. App. 4).

On the third day thereafter, as directed by the Maryland Rules of Procedure, the Clerk made the following entry:

> "4/1/66, Judgment made absolute in favor of the appellees (defendants), for costs of suit." (Opinion, 228 A2d at 314. App. A hereof, p. App. 4).

In this, the Clerk was following the Maryland Rules of Procedure (Vol. 9B Maryland Code (1957) Rule 564 b. 1. and Rule 567 e.)

However *the Clerk was in error,* and the Petitioner did not know he was in error, but instead, for his guidance, consulted and relied on the Clerk's docket entry. Doing so, he filed his appeal to the Maryland appeals court on the last possible day *according to the docket entry.* This was done, apparently, not by laxity, but by design, so as to extend, as far as possible, the time within which the Petitioner could perfect his appeal. If the docket entry were correct, the appeal would have been timely, so the Maryland court said (Opinion, 228 A2d at 314 App. A hereof, p. App. 4).

However, the Maryland Court neatly ruled that the docket entries were not correct, that the Petitioner had relied on them at his peril, and that his appeal had therefore not been timely filed. The Petitioner was out of Court.

The Court held that the case was an Administrative Procedure Act case, that the Maryland Rules of Procedure 564b. 1. and e. did not apply, and that the Clerk's erroneous docket entry was a nullity and of the same effect as if it did not exist. The Petitioner's reliance was simply his misfortune, and the court's good fortune.

Thus, the question of Free Speech, as far as review by this Court was concerned was, it thought, sidestepped by the Maryland Court, apparently with the hoped-for result of making the decision non-reviewable, even though it was principally federal First Amendment grounds which had been pursued below.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

First Amendment Free Speech Question

i.

Before the Administrative Body

In his "Supplemental Order," the Commissioner says that

> "During the hearing . . .
>
> "[t]hree points [were] made by the Respondent's Counsel:
>
> ". . . 3. Freedom of speech and press are given under the Constitution of the United States and no administrative rule can abridge that right." ("Appellant's Appendix," p. E. 36)

Decided as follows: (referring to "3" above)

> "The Commissioner feels this is a proper ground for dismissal of a State employee. The question of the employee's right to be critical is not involved;
>
> ". . . Such communications have no place, no sanction, and no privilege in [government] employment. It promotes the efficiency of the government service to discipline employees using these methods.'" ("Appellant's Appendix" below, p. E. 37).

ii.

On Appeal to the Lower Court
(Baltimore City Court)

The Petitioner's original pleading in the lower court alleged, as the error committed by the administrative body, the following:

> "K. Even if, which is by no means admitted, but is specifically denied, the Appellant *had* written the cartoon and anonymous communications in question, he had a right—perhaps a duty—to do so, and to criticize the public officials who were criticized; it was an abridgment of his right of free speech, not only under the federal Constitution, but under the Maryland Declaration of Rights; that further, the cartoon and communications were wholly innocuous, and only an overly-sensitive individual would have taken offense at them; that 'if judges are to be treated as "men of fortitude, able to thrive in a hardy climate" ', then 'criticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism. . .' (See *New York Times v. Sullivan* 84 S. Ct. 710, 723).

"L. Appellant was denied Freedom of Speech.

"M. Appellant was denied Due Process of Law." (Appellant's Appendix pp. E. 20-21).

Decided as follows:

"Appellant is mistaken when he says he had the right to transmit these scurrilous charges and characterizations in the manner adopted, under the protection of the First Amendment of the Federal Constitution and Article 40 of the Maryland Declaration of Rights. There is nothing stated or implied in either, as interpreted by the Supreme Court, that would give him such a right. An employee does have the right of being critical of his co-workers, his superiors and the governmental branch by which he is employed, but not in the fashion here pursued."

(Appellant's Appendix p. E. 8).

iii.

On Appeal to the Court of Appeals of Maryland (State Court of Last Resort)

The Petitioner, in his Brief before the Maryland appeals court presented for decision only two questions, and the first of these was,

"Did the firing of the Appellant under the circumstances of the case amount to an abridgment of the right of Free Speech under the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment; as well as a violation of Article 40 of the Maryland Declaration of rights? (Appellant's Brief below, p. 2).

Decided as follows:

Not decided. (See iv below. Appeal was dismissed as having been filed out-of-time, on the basis, it is respectfully argued, of a novel application of procedural requirements in a manner prohibited by this Court in *NAACP* v *Alabama* 78 S. Ct. (163, 357 U.S. 458) and other cases.)

The Maryland Court did say, however, in passing, (in dismissing!) that,

> "[W]e have carefully reviewed the merits of the appellant's contentions, and were it necessary, we would rule that his dismissal was legally justified." (228 A2d 313, Md. App. A hereof, p. App. 6.)

Timeliness of Appeal (Raised in Maryland Court of Appeals only)

This question was raised below by the Respondents, of course, in the "Motion to Dismiss Appeal":

> "The Appellees move that this appeal be dismissed pursuant to Maryland Rule 835 b(3), since the order for appeal was not filed with the lower court within the time prescribed by Maryland Rule 812.
>
> ". . . (T)he docket entries made by the clerk were, we suggest, improper and incorrect. . ." (Motion to Dismiss Appeal, Appellee's Motion, etc., below (blue booklet) p. 1).

The Petitioner replied,

> "(T)he Appellant-who was merely attempting to extend as far as possible, the time within which he could raise funds for this expensive (by his standards)

appeal should not be penalized for accepting at face value the clerk's docket entry. . ." (Appellant's Answer to Motion. . ." below, p. 1)

And, in his Motion for Reargument, that

"The Opinion of the Court overlooks the denial of Due Process of Law, under the Fourteenth Amendment to the United States Constitution which the action of this Court amounts to, in denying the Plaintiff the right to place either (a) reasonable, or (b) absolute reliance upon docket entries—the official voice and record of the Court—in the proceedings in his appeal, and the Opinion also amounts to a denial to the Appellant of the Equal Protection. . ."

(Certified Record, p. 63.)

Decided as follows:

The appeal was dismissed (228 A2d at 315, —— Md.——, at last line of Opinion.)

The Motion for Reargument was denied on May 1, 1967. (Certified Record, p. 69).

ARGUMENT

Federal Question of Substance

Does the Constitution Apply to "Quasi-Private" Actions of Governmental Officials?

The argument in this case, urging granting of the writ, is based on the proposition that the Maryland court has decided a federal question of substance in a way which is not in accord with applicable decisions of this court, and has sought to protect the decision behind a novel

procedural facade which it has erected, it is respectfully argued, for the express purpose of preventing this Court from assailing the decision.

The clear principles, then, of three decisions of this Court have been violated:

Garrison v Louisiana 85 S. Ct. 209, 379 U.S. 64 on Free Speech

Thorpe v. Housing Authority 87A S. Ct. —— 385 U.S. ——, 35 LW 4366, on constitutional restrictions on government action, which private persons could perform unstrained (as here firing an employee).

NAACP v. Alabama 78 S. Ct. 1163, 357 U.S. 458, and other cases cited infra, on procedurally barricading appeal of a state court decision to this court.

The Petitioner was a lowly clerk in a lowly court—a traffic court.

He criticized his superior administrative officer with barbed anonymous letters. There was also a cartoon in a neighborhood newspaper.

Garrison v. Louisiana 85 S. Ct. 209, 379 U. S. 64, was a case decided in November 1964, in which Garrison, the District Attorney of Orleans Parish, Louisiana, informed the press in a statement issued at a press conference, that the eight judges of the Criminal District Court of the Parish were *inefficient, lazy, "vacation minded,"* and that they had *hampered his efforts to enforce the vice laws.* (Emph. supp.)

It was held (Brennan, J., speaking for the Court),

that:

". . . (W)here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." (At 85 S. Ct. 215.)

And at ftnt. 9:

"Even the law of privacy . . . recognizes severe limitations where public figures or newsworthy facts are concerned."

And at p. 216:

"Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. . . [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* [v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710] may be the subject of either civil or criminal or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self government."

At. 217:

"The *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false."

At 218:

"The test which we laid down in *New York Times* is not keyed to ordinary care; the defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth."

As to the Petitioner, the thought of applying such a standard *never occurred to his prosecutors,* and the record is wholly, completely, and entirely, devoid of any evidence that the charges were not *true* or that they were made by the Petitioner with *reckless disregard* of whether true or not.

Therefore, under *Garrison,* the statements attribted to the Petitioner *could not be the subject of either civil or criminal* sanctions.

It is respectfully submitted that the Petitioner's discharge from his clerical job *was* a "civil or criminal" sanction. It is not seen how it falls outside of that category, for if it was not that, then what was it?

In *Thorpe v Housing Authority of the City of Durham* (April 7, 1967) 35 LW 4366, this Court held, per curiam, that although a leasing agreement gave a housing authority an ostensible absolute right of eviction, yet, since it was a governmental agency, it had to observe the Constitution, and could not evict for arbitrary reasons, or reasons impairing the right of free association.

The case was remanded because of a changed order of operations issued for the housing authority by its administrative superiors, but Mr. Justice Douglas concurring, @35LW 4367, said:

> "[The Petitioner claimed in the pleadings] that her 'eviction primarily resulted from her community activities as an organizer of tenants, thus constituting an unconstitutional abridgment of her freedom of expression and a denial of equal protection of the law'...

@4368:

"This case present(s) two issues . . . Second, is whether a tenant in such a housing project can be evicted *for the exercise of a first Amendment right.* (Emph. supp.).

. . . "Over and over again we have stressed that 'the nature and theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play and action of purely personal and arbitrary power.' (*Yick Wo* v *Hopkins* 118 U.S. 356, 369) and that the essence of due process is 'the protection of the individual against arbitrary action' *Ohio Bell Telephone Co. v Public Utilities Comm'r.* 301 U.S. 292, 302 (Mr. Justice Cardozo); *Slochower v. Board of Higher Education* 350 U.S. 551, 559 . . . It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. *For this is a government we are dealing with,* and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. The government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process. *Rudder v. United States,* 226 F2d 51, 53. (Emph. Supp.)

"The recipient of a government benefit, be it a tax exemption (*Speiser v. Randall* 357 U.S. 513), unemployment compensation (*Sherbert v. Verner,* 374 U.S. 398), *public employment* (*Slochower v. Board of Education,* 350 U.S. 551), a license to practice law (*Spevack v Klein,* 385 U.S. 511), or a home

in a public housing project, cannot be made to forfeit the benefit because he exercises a constitutional right." (Emph. Supp.)

The only dissent in *Thorpe* was on the part of Mr. Justice White, not on the law, but based on his contention that the court below had found as a fact that the eviction was not because of the exercise of First Amendment rights. On the law, then, the Court was unanimous.

Maryland Failed to apply *Thorpe* or *Garrison*

The Maryland Courts in this case however, and the administrative body as well, of course, failed entirely-anywhere in the record—to apply the *Garrison v. Louisiana* standard, or that of *Thorpe.*

The decisions below, therefore, not having taken *Garrison* into account at all, nor *Thorpe,* were, it is respectfully urged, not consonant, on a matter of substance, with the holdings of this court.

A Matter of Great Public Concern, Not Yet Ruled Upon

Moreover the granting of the Petition would present an opportunity to expound on a matter of great public concern, and presently, a matter of largely undefined principle, concerning public instrumentalities doing acts which are ordinarily of a *private* character, and yet are increasingly being performed by administrative agencies of one sort or another, federal, state and municipal.

When acting in a normally private sector, how are these public officials required to act? Morally? Amorally, whenever money would be saved? As "Economic Man? As old-fashioned robber barons? Are agencies answerable only to the electorate through their superiors? Or to the Constitution, through the courts? Are they bound

by private conscience? Does their public duty require them to be conscienceless in serving the good of their agency? Are they bound by individual scruple? By constitutional prohibitions on public action?

The questions are perhaps difficult, perhaps not; but they have none of them been definitively answered. At least the one question of constitutional limitation on "quasi-private activity," by public agencies, it would seem, clearly needs answering.

In *Thorpe v. Housing Authority*, 35 LW 4366,——U.S. ——,—— S. Ct. ——, (April 7, 1967) the questions were not specifically reached. In that case, a tenant was evicted from a public housing project for allegedly exercising First Amendment rights, by organizing the tenants against the housing authority. So it was contended, at least. But the case was remanded, and except for Mr. Justice Douglas' concurrence, the Court has not expounded its philosophy on this important matter.

The Petitioner's Plight

This Petitioner's situation is similar to Thorpe's, however, and no remand without decision can succor him.

He alleged he was fired from a public clerical job of absolutely no policy-making importance because he exercised his right of Free Speech, by writing critical letters to his administrative superior, seeking correction of abuses which could only be corrected by higher-ups who were in policy-making positions. The letters were anonymous, and the decisions below upheld the firing by deciding that he was not fired for what he said, but because of how he said it—anonymously. In each instance, however, the decisions more or less pointedly refrained from discussing Free Speech protections, deciding only that

anonymous Free Speech was outside of constitutional protections, apparently in all circumstances.

One decision—that of the Baltimore City Court, went so far as to base this conclusion on the restricted holding in *Krennrich v U.S.*, 340 F2d 653, a case in which anonymous accusations of "running around with other women" were leveled at a superior by letters to his wife. (Page E. 8-E. 9 of Appellant's Appendix below.) From this case, the Baltimore City Court extrapolated the principle that *all* anonymous communications everywhere, under every circumstances, would be cause for discharge, despite the federal Constitution or any constitution.

The Free Speech In Question

The Petitioner's letters were pointed, but earnest requests to the bureau chief, for changes in his operating procedures. (E. 5-E. 7 "Appellant's Appendix").

Included was a suggestion that the office teletype line to the Commissioner of Motor Vehicles office not be used for private business. Included was a request for changes in traffic-warrant serving procedures, pointing out the occurrence of a flood of indignant phone calls to the office because of the then-current procedure, which the bureau chief was apparently unaware of. There also was a rather ordinary, but highly critical political cartoon published in a neighborhood weekly newspaper (of the free-distribution type, but carrying large amounts of responsible paid advertising), which was attributed to the Petitioner, and which was a major reason for his discharge. The cartoon is reprinted in the Appellees' Appendix below as p. 1 thereof, as filed, but does not appear in the copies supplied to the Petitioner. Copies have been added.

But the questions of the *Thorpe* case, important questions, remain unanswered, as yet.

An Attempt Has Been Made by the Maryland Court to Preclude this Court from Ruling

By not deciding the Free Speech question (except as an afterthought: "Were it necessary, we would rule that his dismissal was legally justified" 238 A2d at 315) the Maryland Court has attempted to foreclose further review of its proceedings.

It pretends that the Petitioner was lax, or lazy, or indifferent in following procedural rules, and filed his appeal late, for which he is to be punished.

He was not lax, but only poor.

He consciously sought to have as much time as possible to raise the heavy expenses of pursuing justice. In his Answer to the "Motion to Dismiss Appeal" before the Court of Appeals (at p. 1 of "Appellant's Answer to Motion. . .") he states, "the Appellant . . . was . . . attempting to extend as far as possible the time within which he could raise funds. . .". So much only can be argued within the Record, but there was more, it is respectfully argued, as may be inferred, it is suggested, from an absolute absence in the Record of any other inference of dilatoriness or laxity. Perhaps the court can take judicial notice of the practice of attorneys, often made, of utilizing the uttermost limit of time available, for practical reasons entirely removed from any question of procrastination. Nor, has the Maryland Court given even lip service to the modern doctrine taken over from equity, of abhoring a forfeiture.

Furthermore, the court Clerk, on whose "error" in his docket entry the Petitioner relied, was himself relying on the *Maryland Court's own Rule.* Rule 564b, *of the Maryland Court of Appeals* provides:

"Rule 564 Trial by the Court.

* * * * * *

"b. Judgment Nisi

"1. As directed by the Court

"Where an action at law is tried upon the facts by the court, the court shall direct judgment *nisi* to be entered upon the law and the evidence

* * * * * *

"Rule 567. New Trial

* * * * * *

"e. Effect of Failure to File Motion-Entry of Final Judgment.

"If a motion for new trial be not made, within the time prescribed by section a of this Rule [three days], the Clerk shall enter a final judgment as of course."

The Rule Applied by the Maryland Court is Novel

But, by *judicial sleight-of-hand,* bona fide reliance on the docket entry by the Petitioner became fatal. After full briefing, argument, and payment of legal expenses, after sweat, tears and sorrow in full measure, the Petitioner was told, in the sonorous cold voice of the court:

". . . [T]he entry of a judgment nisi in favor of the appellees [by the Court Clerk] was erroneous, and under the circumstances presented here, the appellant was not *privileged* to rely on the erroneous

state of the docket" (Emph. supp.—The *right* to rely was not discussed, be it noted). 228 A2d at 314, p. App. 4.

This is judicial sleight-of-hand, it is respectfully argued, and not decision-making, for it is conscientiously believed that this is a most novel interpretation of the procedural law—the usual, if not universal rule being it is respectfully suggested, that docket entries are correctible *in the court where made,* and until corrected, may be *absolutely* relied on:

> "Judicial records are not only necessary, but indispensable to the vitality of a court. The court . . . decides upon its records; it acts by its records; . . . its judgments can only be evidenced by its records . . . The acts of a court of record are known by its records alone and cannot be established by parol testimony . . . Furthermore, the records of a court cannot be impugned upon matters within its jurisdiction, when offered in evidence, by counter evidence.
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> • • • • • •
>
> "(W)henever it is properly brought to the knowledge of the court that a record made by the clerk does not correctly show the order or direction which was in fact made by the court at the time it was given, the court has authority to correct its record in accordance with the facts. *American Jurisprudence,* Courts, Secs. 37 and 41.

Under the law in at least one case, in fact, the error is to be regarded as that of the *Respondent,* and not the Petitioner, according to a quotation from CJS Judgments, Sec. 108:

> "It is the duty of the *successful party* to cause the judgment to be entered, and to see that it is entered

correctly". Wood v. Reynolds 7 Watts & S 406 (Penna.), 34 C.J. p. 61 n. 17, Sandoval v. Rattikin (Texas) 395 S. W. 2d 889, cert. den. 87 S. Ct. 199. Sec. 281 P2d 296.

At 14 ALR 2d 224, a long, authoritative article on the subject of *notice* before correction of erroneous docket entries appears. The article assumes throughout, that corrections can only be made by the court which originally rendered the judgment.

The subject of this (the within) Petition is precisely discussed in 21 ALR 2d 295, an article entitled, "Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings". It is therein stated, at p. 287.

"Generally, a court has power to amend records of its judgments by correcting mistakes, or supplying defects or omissions therein.[1] The question discussed in the present annotation is whether, when such amendment or correction has been made, the time for appeal is measured from the date of the original judgment, order, or decree, or from the date of the amendment or modification[2]

"Subject to certain qualifications separately discussed in the sections which follow, it seems to be the general rule that where a judgment, order, or decree is amended or modified, the time from which the appeal must be taken is to be computed from the date of the amendment or modification.

"*United States.*—United States v. Gomez (1864) 1 Wall 690, 17 L ed 677; Memphis v. Brown (1877) 94 US 715, 24 L

"[1] See 30 Am Jur 866, Judgments § 94.

"[2] The general subject of the power of the trial court indirectly to extend the time for appeal is discussed in an annotation in 89 ALR 941, supplemented in 149 ALR 740."

ed 244; Zimmern v. United States (1936) 298 US 167, 80 L ed 1118, 56 S Ct 706; Fultz v. Laird (1928, CA6th Mich) 24 F2d 172; Union Guardian Trust Co. v. Jastromb (1931, CA6th Mich) 47 F2d 689; Ray v. United States (1941, CA7th Ind) 121 F2d 416."

No Maryland cases are cited.

ALR 2d "Later Case Service," including pocket-part through 1966 shows no change in this view, nor does it cite any Maryland cases. The latest U.S. case cited is U.S. v. Adams, 383 U.S. 39, 15 L. Ed. 2d 572, 86 S. Ct. 708, in which this court expressed the view that where a timely motion to amend a judgment is filed, the time for applying for certiorari runs from the date of overruling of such motion. See 86 S. Ct. 709, text at ftnt. 1, and ftnt. 1.

The court there also held-and it would seem to be of interest here-that Supreme Court Rules 21 (1) and 33, as to service, are not jurisdictional, and that where no prejudice resulted in the failure to follow them, and the failure was inadvertent, it could not be availed of by a party (at p. 709 of 86 S. Ct.).

Such novel procedural interpretations as the Maryland Court adopted, however, as a bar to further review, by virtue of a series of decisions of this court, ordinarily won't work, it is respectfully suggested.

Review by this Court Cannot Be Thwarted by Novel Procedural Applications.

Thus, in *Douglas v State of Alabama* 380 U.S. 420, 85 S. Ct. 1074 at 1078, it was said, regarding state procedural requirements on the placing of an objection to a confession,

"In the light of [the form of objection actually made at trial], it is hard to understand the [Alabama] Court of Appeals' conclusion; nevertheless, accepting the finding as an authoritative interpretation of Alabama law, we follow our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question. See *Wright v. Georgia* 373 U.S. 284, 289-291, 83 S. Ct. 1240, 1243-1245, 10 L. Ed. 2d 349. In determining the sufficiency of objections, we have applied the general principle that an objection which is ample . . . to bring the alleged federal error to the attention of the trial court . . . is sufficient to serve legitimate state interests. . . ." (Citing federal cases).

In *Young v. Ragen* 69 S. Ct. 1073, 1074, 337 U.S. 235 (1949), it was held

". . . [O]f course Illinois may choose the procedure it deems appropriate for the vindication of federal rights. But is it not simply a question of procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." (Emph. the Court's).

And in *Wright v. State of Georgia*, 373 U. S. 289, 83 S. Ct. at 1244, state procedural Gordian knots were miraculously untied, opening the door of this court to review:

"A commentator on Georgia procedure has concluded that '[p]robably no phase of pleading in Georgia is fraught with more technicalities than with respect to raising constitutional issues.' Examination of the Georgia cases bears out this assertion. In an extraordinary number an attempt to raise

constitutional issues has been frustrated by a holding that the question was not properly raised or pursued. But '[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice,' Davis v. Wechsler, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L.Ed. 143. See also Love v. Griffith, 266 U.S. 32, 45 S. Ct. 12, 69 L.Ed. 157; Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L.Ed. 1117; Terminiello v. Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L.Ed. 1131; Staub v City of Baxley, 355 U.S. 313, 78 S. Ct. 277, 2 L.Ed.2d 302; N. A. A. C. P. v. Alabama ex rel. Patterson, 357 US. 449, 78 S. Ct. 1163, 2 L.Ed 2d 1488

"In this case the Georgia Supreme Court held that error in the denial of the motions for a new trial could not be considered because "[t]here was no argument, citation of authority, or statement that [the grounds for reversal stated in the new trial motions] • • • were still relied upon.' The court found 'the applicable rule, as laid down in Henderson, v. Lott, 163 Ga. 326(a), 136 S.E. 403, [to] be] • • •: 'Assignments of error, not insisted upon by counsel in their briefs or otherwise, will be treated by this court as abandoned.'

". . . As was said in a similar case coming to us from Georgia courts, this [requirement] 'would . . . force resort to an arid ritual of meaningless form.' *Staub v. City of Baxley*, supra, 355 U.S. at 320, 78 S. Ct. at 281. The State may not do that here any more than it could in *Staub*. Here, as in *Staub*,

the state ground is inadequate. Its inadequacy is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court. [A] local procedural rule, although it may now appear in retrospect to form a part of a consistent pattern of procedures . . . cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. *Novelty in procedural requirements cannot be permitted to thwart review in this court . . .' NAACP v Alabama ex rel. Patterson,* supra 351 U.S. at 457, 78 S. Ct. at 1169." (Emph. supp.)

And in *NAACP v Alabama,* 357 U.S. 454, 78 S. Ct. 1163 at 1168,

". . . The State Supreme Court thereafter twice dismissed petitions for certiorari to review this final contempt judgment, the first time, 265 Ala. 699, 91 So. 2d 221, for insufficiency of the petition's allegations and the second time on procedural grounds. 265 Ala. 349, 91 So.2d 214. We granted certiorari because of the importance of the constitutional questions presented. 353 U.S. 972, 77 S. Ct. 1956, 1 L.Ed. 2d 1135.

"We address ourselves first to respondent's contention that we lack jurisisdiction because the denial of certiorari by the Supreme Court of Alabama rests on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate remedy under state law. Respondent recognizes that our jurisdiction is not

defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support,' Ward v. Board of County Commissioners, 253 U.S. 17, 22, 40 S. Ct. 419, 421, 64 L.Ed. 751. It thus becomes our duty to ascertain, '* * * in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment.' Abie State Bank v. Bryan, 282 U.S. 765, 773, 51 S. Ct. 252, 255, 75 L.Ed. 690.

"The Alabama Supreme Court held that it could not consider the constitutional issues underlying the contempt judgment which related to the power of the State to order production of membership lists because review by certiorari was limited to instances '* * * where the court lacked jurisdiction of the proceeding, or where on the face of it the order disobeyed was void, or where procedural requirements with respect to citation for contempt and the like were not observed, or where the fact of contempt is not sustained * * *' 265 Ala. at page 353, 91 So.2d at page 217. The proper means for petitioner to obtain review of the judgment in light of its constitutional claims, said the court, was by way of mandamus to quash the discovery order prior to the contempt adjudication. Because of petitioner's failure to pursue this remedy, its challenge to the contempt order was restricted to the above grounds. Apparently not deeming the constitutional objections to draw into question whether 'on the face of it the order disobeyed was void,' the court found no infirmity in the contempt judgment under this limited scope of review.

* * * * * *

"We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgement. . . .

"Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner *could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court* applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. Cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed. 1107." (Emph. supp.)

Once again, in *Barr v City of Columbia*, 378 US. 148, 84 S. Ct. 1734, this court examined an attempt below to decide a matter once and for all, and undisturbed by any high-flown constitutional principles, by not deciding it:

"We consider first the question whether petitioners' convictions for breach of the peace are constitutionally valid. Apart from the fact that petitioners remained in the store after having been asked to leave, there is a complete and utter lack of any evidence, and no suggestion in the opinions of any of the courts below, that any of the petitioners did anything disorderly or did anything other than politely ask for service. Petitioners argue that either

the breach-of-peace statute as applied to their conduct was unconstitutionally vague for failure to give fair warning, cf. Lanzetta v. New Jersey, 306 U.S. 451, S. Ct. 618, 83 L.Ed. 888, or there was no evidence to support convictions for violation of that statute, cf. Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, r L.Ed. 2d 654.

"*The city replies that, because the Supreme Court of South Carolina refused to pass on objections to the breach-of-peace conviction on the ground that the exceptions taken below were 'too general to be considered,' we are precluded from considering petitioners' constitutional objections.*

"We cannot accept the city's argument, since in City of Columbia v. Bouie, 239 S.C. 570, 124 S.E.2d 332, rev'd on another point, 378 U.S. 347, 84 S. Ct. 1697 decided only a few weeks after the present case, the State Supreme Court had before it the identical two exceptions, and relying on them reversed for insufficiency of evidence the conviction of a peaceful and quiet sit-in demonstrator who had been convicted on a charge of resisting arrest. In three other cases decided in the two-month period preceding the present decision it likewise considered these same exceptions enough to raise the question of sufficiency of evidence, and in one of those three cases, decided the day before the present one, it reversed on that ground a conviction for interfering with an officer. *We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review.* See e.g., N.A.A.C.P. v Alabama ex rel Flowers, 377 U.S. 288, 84 S. Ct. 1302; Shuttlesworth v. City of

Birmingham, 376 U.S. 339, 84 S. Ct. 795, 11 L.Ed.2d 766; Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L.Ed.2d 349; N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S. Ct 1.163, 2 L.Ed.2d 1488. We conclude that there is no adequate state ground barring our review of the breach-of-peace convictions. (Emph. supp.)

It is hoped that the same rule will be found applicable here.

CONCLUSION

Wherefore, it is respectfully urged, that certiorari be granted, directing the Court of Appeals of Maryland to submit its Record in the within case for review by this Court of its rulings, or lack of same, on the federal questions of substance raised in that Record.

Respectfully submitted,

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